

BINGHAM McCUTCHEN

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August 3, 2005

Via E-Mail and U.S. Mail

John H. Robertus
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 California Regional Water Quality Control Board, San Diego Region
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**Re: BP Comments on Proposed Procedures for Issuance of
 Cleanup and Abatement Order No. R9-2005-0126**

Dear Mr. Robertus:

BP West Coast Products LLC, (referred to in this letter, together with its predecessors in interest, as "BP")¹ appreciates this opportunity to submit comments to the California Regional Water Quality Control Board, San Diego Region ("Regional Board") on the Proposed Procedures for Issuance of Cleanup and Abatement Order No. R9-2005-0126 ("Proposed Procedures"). BP previously has submitted comments on the Regional Board's Tentative Cleanup and Abatement Order No. R9-2005-0126 ("Tentative Order") to named "Dischargers" to clean up and abate contaminated marine sediments in San Diego Bay within and adjacent to the NASSCO and Southwest Marine leaseholds ("Shipyard Sediment Site").

BP appreciates the Regional Board's attempts to define the general manner and framework of future proceedings on the Tentative Order through the Proposed Procedures. However, we remain concerned that certain aspects of the Proposed Procedures fail to adequately protect the procedural rights of the Dischargers, and/or fail to reflect the appropriate requirements of the California Administrative Procedure Act ("APA") and/or the applicable requirements contained in Title 23 of the California Code of Regulations ("CCR"), Division 3, Chapter 1.5, Sections 648 et seq.

- As an initial matter, BP reserves its rights under federal and state constitutions, laws, regulations and other authority applicable to the Proposed Procedures, including, but not limited to, the California APA (Cal Gov. Code §§ 11400 et seq. & 11513); Title 23 of the CCR, Division 3, Chapter 1.5, Sections 648 et seq.

¹ BP West Coast Products LLC is the current owner of the terminal located at 2295 E. Harbor Dr., San Diego, which is referred to incorrectly as the "ARCO Terminal" in the Tentative Order. The Tentative Order also incorrectly identifies BP as the "parent company and successor to Atlantic Richfield Company."

JJM 8/5
John Costa
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To the extent the Proposed Procedures fail to meet requirements contained in these or other applicable authorities, BP reserves the right to raise these compliance issues in this and any future proceedings concerning the Tentative Order and any final cleanup and abatement order (“CAO”) issued by the Board.

- The Regional Board should be included as a “party” to these proceedings, pursuant to the APA definition of “party” as including “the agency that is taking action.” *See* Cal. Gov. Code § 11405.60. The Regional Board should amend the Proposed Procedures to clarify that it is a “party” and subject to the same legal and regulatory requirements as other “parties” to the matter.
- BP is concerned that the Proposed Procedures do not adequately define the role of the Executive Officer in this matter, nor do they adequately ensure a fair separation of advisory and advocacy functions. California law requires that, for reasons of ensuring due process, “the adjudicative function [of the Board] shall be separated from the investigative, prosecutorial, and advocacy functions within the agency as provided in Section 11425.30 [addressing presiding officers]” Cal. Gov. Code § 11425.10(a)(4). The Executive Officer has been immersed in the investigatory and advocacy side of this matter from its inception, working closely with Staff on substantive technical issues that appear to fall under the responsibility of the “Sediment Site Cleanup Team” described in the Proposed Procedures. Yet, the current version of the Proposed Procedures also would allow the Executive Officer to participate on the “Advisory Team” advising the Regional Board in its deliberations on the evidence. This “combination of prosecutorial and adjudicative functions is the most problematic combination for procedural due process purposes” (*see* *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal. App. 4th 81, 93), and the Proposed Procedures should be revised to clarify that the Executive Officer’s role is confined to the “Cleanup Team,” not also the “Advisory Team.”
- BP requests that the Regional Board amend the Proposed Procedures to more explicitly address the due process rights of parties to conduct discovery as required, including the right to subpoena documents and witnesses, depose and cross-examine witnesses, and request full disclosure of documents and evidence relied upon by the Regional Board or its staff (including internal communications germane to the proceedings). California law specifically allows in this type of matter for depositions (*see* Cal. Water Code § 1100) and other discovery necessary to ensure due process (*see* *Mohilef v. Janovici* (1996) 51 Cal. App. 4th 267, 302). Such discovery should assist the Regional Board in determining (among other things) whether sufficient evidence exists to name certain parties as “Dischargers,” whether a CAO is justified at all, and if so, what type of cleanup levels and procedures should be considered in this matter.
- While the Proposed Procedures allow for submittal of testimony and other evidence on “What Persons Should Be Required to Provide Cleanup and Abatement for Waste Discharged to, or Deposited in, Marine Sediments of San

Diego Bay,” BP is concerned that the Proposed Procedures do not provide for a separate, threshold determination of whether the parties currently named as “Dischargers” in the Tentative Order are properly named in the Order. BP previously has commented to the Regional Board that there is insufficient evidence for BP to be named as a “Discharger,” and other parties have made similar arguments that they should not be named in the Tentative Order. Resolution of this critical question early in the process could allow certain parties to be removed from the Tentative Order, thereby avoiding an otherwise substantial devotion of time and resources discussing cleanup levels and abatement alternatives. It could also allow the Regional Board to conduct focused cleanup and abatement efforts with those parties actually responsible for the contamination involved.

- The issues for consideration in the development of any Cleanup and Abatement Order for the Shipyard Sediment Site cannot be artificially limited to the six issues described in the Proposed Procedures. Title 23 of the CCR, Section 647.3 places no limitations on the content of, or issues to be discussed in, comments on an agenda items before the Regional Board. *See* 22 CCR § 647.3(a) (“Any person may submit comments in writing on any agenda item.”) In particular, the named “Dischargers” have a due process right to provide comments on any issue relevant to the proceeding before the Regional Board, including whether evidence of general industry practices is sufficient to support Regional Board findings, whether chemical composition of identified contamination is consistent with potential sources of contamination from the alleged “Dischargers,” and whether a Cleanup and Abatement Order is appropriate at all.
- BP appreciates the Regional Board’s clarification of the participation of “Interested Persons” in this matter as including only the submittal of “written non-evidentiary policy statements or comments” (*see* Proposed Procedures at 8-9). BP requests that the Regional Board further clarify that, to the extent “Interested Persons” submit policy statements or comments that include evidence or submittals intended to be included in evidence, those parties will be subject to cross-examination as the regulations require. *See* 23 CCR § 648.1(d) (“[p]ersons presenting nonevidentiary policy statements will not be subject to cross-examination . . . ”)

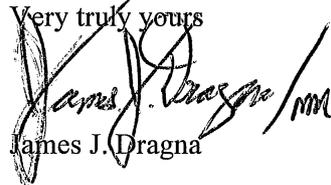
Finally, in addition to these comments, BP reserves the right to join in and/or incorporate by reference comments or objections made by other parties, Dischargers and interested persons in this matter. BP further reserves the right to offer testimony, exhibits and/or other evidence on those issues, or the issues raised in this comment letter, at the August 10 Regional Board meeting on the Proposed Procedures. We also reserve the right to submit additional evidence to the Executive Officer or to the Board as appropriate in future proceedings.

BP again thanks the Regional Board for consideration of these comments, and continues to look forward to working closely with the Regional Board and its staff on issues related

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to the proposed procedures and any resulting process to consider an Order for Abatement for the Shipyard Sediment Site. We look forward to addressing these issues in person at the Regional Board meeting on August 10, 2005.

Very truly yours

A handwritten signature in black ink, appearing to read "James J. Dragna". The signature is stylized and written over the printed name below it.

James J. Dragna

Bingham McCutchen LLP
bingham.com

Enclosure